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No. 00-1747

In The

Supreme Court of the United States

WEST INDIES TRANSPORT CO., INC.,
WIT EQUIPMENT CO., INC., and
W. JAMES OELSNER,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITIONERS' REPLY TO BRIEF IN OPPOSITION

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ARGUMENT IN REPLY

WEST INDIES TRANSPORT CO., INC., WIT EQUIPMENT CO., INC., and W. JAMES OELSNER have petitioned this Court jointly for a writ of certiorari to review the judgment and memorandum of the Third Circuit, enforcing a lien to execute part of a judgment of sentence in a federal criminal case in which they were co-defendants. Pet. App. 1-2. The district court, at sentencing, declared the defendants (petitioners here) jointly and severally liable for up to $1,440,450 as the estimated costs of removing wrecks from Krum Bay, St. Thomas, U.S. Virgin Islands, characterizing this as an order of restitution.[1]

The brief in opposition ("Br.Opp.") proposes two reasons why certiorari should not be granted. Neither touches the merits. First, the respondent relies on 28 U.S.C. § 3202(d), which restricts the issues that the district court may consider at a hearing on a motion to quash a writ of execution to collect a debt due the United States.[2] Br.Opp. 5-7. Under that statute, the government

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[1] The district court later clarified that this amount was to be paid to the United States, to the extent the petitioners did not satisfactorily undertake the cleanup effort themselves, and subject to a reduction if the actual cost of cleanup proved to be less. Pet.App. 2, 7, 47-48, 55. In addition, petitioner Oelsner was ordered to pay $595,500 in fines (plus $750 in special assessments), while the two corporate petitioners were to pay another $3,520,500 and $1,520,500, respectively, on top of the restitution. Pet.App. 5 n.3.

[2] This part of the Federal Debt Collection Procedures Act of 1990 provides:

> **(d) Hearing.** – By requesting, within 20 days after receiving the notice described in section 3202(b),

contends, even the blatant invalidity of the restitution order cannot be considered; it must simply be enforced and executed. Second, the respondent contends that the arguments made in the petition were not advanced in or considered by the courts below. Br.Opp. 7-8.

On the underlying merits question, the government concedes a square conflict in the circuits, Br.Opp. 8 (citing *United States v. Snider*, 957 F.2d 703, 706 (9th Cir. 1992)

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the court to hold a hearing, the judgment debtor may move to quash the order granting such remedy. The court that issued such order shall hold a hearing on such motion as soon as practicable, or, if so requested by the judgment debtor, within 5 days after receiving the request or as soon thereafter as possible. The issues at such hearing shall be limited –

(1) to the probable validity of any claim of exemption by the judgment debtor;

(2) to compliance with any statutory requirement for the issuance of the postjudgment remedy granted; and

(3) if the judgment is by default and only to the extent that the Constitution or another law of the United States provides a right to a hearing on the issue, to –

(A) the probable validity of the claim for the debt which is merged in the judgment; and

(B) the existence of good cause for setting aside such judgment.

This subparagraph shall not be construed to afford the judgment debtor the right to more than one such hearing except to the extent that the Constitution or another law of the United States provides a right to more than one such hearing.

28 U.S.C. § 3202.

(per curiam; on rehearing)), but merely repeats its procedural reason for suggesting that "this case does not provide an appropriate vehicle for resolving the conflict. . . . " Br.Opp. 8-9. Finally, respondent contends that it is well-settled that the government can be a victim eligible to receive restitution under 18 U.S.C. § 3663 – a point not disputed in the petition – and then asserts, without explanation, that the Coast Guard was such a victim here. None of these objections justifies denial of the petition.

1. The respondent waived its reliance on 28 U.S.C. § 3202(d) below, and in any event that statute is inapplicable to proceedings in this Court.

The respondent relies first upon the objection that the validity of the restitution judgment cannot be raised as a defense in proceedings to execute on that judgment. This is the position initially taken by the district court, Pet.App. 44, and the hearing held below was accordingly limited in accordance with § 3202(d) of the Federal Debt Collection Procedures Act. In response to the defendant-petitioners' motion for relief from judgment (which the district court mistakenly referred to as a "second motion . . . to quash or stay the government's writ of execution," Pet.App. 21), however, the district court made no reference to this statute, relying instead on the mandate rule and the law of the case. Pet.App. 28. This was appropriate, as the statute expressly limits only the issues to be considered "at such hearing," *see* note 2 *ante*, and not the power of the district court to reconsider its own judgment more generally.

More important, the government made no reference whatever to 28 U.S.C. § 3202(d) (or any other part of the Debt Collection Act) in the court below (*see* Appellee's Br., 3d Cir. No. 00-3449, filed Sept. 28, 2000; *id.* at ii (table of authorities)). To the contrary, after first arguing that the motion for relief from judgment was an improper attempt to create appellate jurisdiction over the (unappealed) denial of the original motion to quash (a position abandoned by the Solicitor General in opposition to the petition), Appellee's Br. at 6-10,[3] the government proceeded to argue *only* that the relief sought by petitioners was barred by the "law of the case." *Id.* 10-12. In doing so, the government conceded that an exception would apply if the prior judgment were "clearly erroneous and would work a manifest injustice." *Id.* 11. This is just as petitioners contend. Pet. 15.[4]

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[3] The government never argued that the district court had abused its discretion by entertaining the Rule 60(b) motion. Perhaps for this reason, the court below did not even allude to the government-appellee's "jurisdictional" argument; apparently for the same reason, as already noted, the respondent does not advance that argument in this Court in opposition to granting the petition.

[4] The respondent's contention that a proceeding to enforce a criminal judgment is a new and separate (civil) "action or proceeding" under 28 U.S.C. § 3202(b) to which the law of the case doctrine does not apply, Br.Opp. 6-7, is also newly conceived in this Court. The government's initial pleading in the district court was filed under the criminal docket number, and the district court proceeded accordingly (opening a civil docket only when a third party initiated a separate challenge to the writ); the government as appellee made no such argument in the court below, and the court of appeals likewise viewed the proceedings as a continuation of the criminal case.

Not having advanced the statutory defense in the court below, the government has waived that position as respondent in this Court. See *Steagald v. United States*, 451 U.S. 204, 209 (1981); *Hankerson v. North Carolina*, 432 U.S. 233, 240 n.6 (1977); see also *Zobrest v. Catalina Foothills School District*, 509 U.S. 1, 7-8 (1993)[5]; *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 38-39 (1989). The court below thus likewise affirmed the district court solely on the basis of the law of the case, and without reference to any statutory bar. Pet.App. 2. In fact, apparently in the alternative, the court below addressed one of petitioners' objections to the restitution order on its merits. *Id.*

Accordingly, the respondent's principal reason for denying the writ fails. Not only was the government's present position abandoned in the court below, when it relied solely on the law of the case doctrine which it now claims is inapplicable, but it deprived the petitioners and the court below of any opportunity to debate the breadth of the statutory bar. In any event, nothing in § 3202(d) applies to the scope of this Court's authority to consider federal judgments: "A petition for writ of certiorari can expose the entire case to review." *Christianson v. Colt Industries Operating Corp.*, 486 U.S. 800, 817 (1988).[6]

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[5] Ironically, respondent cites *Zobrest*, a case about the limits on what a respondent will be heard to argue in this Court in defense of the judment below, as if it were authority on the scope of what questions a petitioner may properly present. *See* Br.Opp. 7.

[6] For a closely related reason, it is unimportant that petitioners did not vainly press the district court to disregard the Third Circuit's prior decision in this case, nor even ask the court below to reverse its prior, published precedent. *Compare*

For these reasons, the cited provision of the Federal Debt Collection Procedures Act should not dissuade this Court from consideration of the instant petition.

2. The respondent offers not a word in defense of the Third Circuit's blatantly erroneous construction and application of the restitution act.

Petitioners argue that the judgment of restitution imposed on them at sentencing and enforced in the proceedings below is facially invalid under 18 U.S.C. § 3663(a), the restitution provision of the Victim Witness Protection Act ("VWPA"). Their point is simple and clear: liability as one sort of "principal" or another under 18 U.S.C. § 2 for an offense committed under another title does not render that offense one under title 18. As the Ninth Circuit succinctly put it, "The mention of section 2 does not bring the restitution order with the ambit of the VWPA. Section 2 does not establish 'an offense' of which a defendant may be convicted; it merely determines which offenders may be punished as principals." *United States v. Snider*, 957 F.2d 703, 706 (9th Cir. 1992) (per curiam; on rehearing).[7] The government does not offer a

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Br. Opp. 7-8. This Court is the appropriate venue to seek resolution of a split in the circuits and to overturn the decision of the court below rendered on direct appeal, by which a different panel of the same circuit was necessarily bound.

[7] Petitioners agree that *Snider* more clearly demonstrates the existence of a circuit split than the cases they cited, *United States v. Minneman*, 143 F.3d 274, 283-84 (7th Cir. 1998), and *United States v. Helmsley*, 941 F.2d 71, 101 (2d Cir. 1991). *See* Pet. 19. (We appreciate the Solicitor General's characteristic professionalism in this regard.) Our point was only that the

single word in defense of the contrary proposition, even though the petitioners were ordered by the courts below to pay the United States over $1.4 million on that indefensible view of the statute. The respondent concedes a square conflict of published authority between the circuits on this point. Br.Opp. 8. It follows that the requested writ of certiorari should be granted, not denied.

Likewise, on the merits of the other question presented as to the scope of permissible restitution – whether the United States was improperly designated as a "victim" of the petitioners' water pollution offenses – the respondent's position is entirely conclusory. Petitioners have not argued that the government can never be a "victim" for restitution purposes, respondent's straw man argument to the contrary (Br.Opp. 9) notwithstanding. If a crime had been committed against the government's proprietary interests, such as a theft or destruction of government property, then restitution could properly have been made part of the judgment of sentence. But that is not this case. The Coast Guard was not "directly and proximately harmed" by any pollution of Krum Bay. 18 U.S.C. § 3663(a)(2).

Rather, as petitioners have argued, "A governmental agency charged by law with remediating a public harm is not 'victimized' by private, illegal conduct which causes that harm. The agency's expenditures in fulfillment of its public duty are not 'losses' of a crime victim." Pet. 19-20. The circumstances of this case are much more like those

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restriction on § 3663(a) could have been evaded in the same way, by reference to 18 U.S.C. § 2, in those cases, had the Seventh or Second Circuit thought it permissible, but it was not.

of the cases where the circuits have unanimously reversed attempts to award the government "restitution" for its law enforcement expenses, such as the "buy money" used in controlled substances "sting operations." This proposition is now so well recognized that the government has conceded ineffective assistance of counsel, when raised on direct appeal, for stipulating that a defendant should be ordered to pay such "restitution." See *United States v. Bettie*, 2000 WL 1853318 (4th Cir., filed Dec. 19, 2000) (unpub.), noted at 238 F.3d 415 (citing five other circuits as establishing invalidity of such restitution). Respondent does not attempt to answer or refute this argument at all, apparently because it cannot.

Accordingly, to the extent that the respondent claims that this Court should deny certiorari simply because petitioners "err" in their arguments on the merits, Br.Opp. 9, it is the respondent's position that falls short. The petition for certiorari should be granted.

CONCLUSION

For the foregoing reasons, and for the reasons discussed more fully in their petition, WEST INDIES TRANSPORT CO., INC., WIT EQUIPMENT CO., INC., and W. JAMES OELSNER pray that this Court grant their petition for a writ of certiorari to review the judgment and memorandum of the United States Court of Appeals for the Third Circuit upholding the district court's enforcement of the lien for restitution.

Respectfully submitted,

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